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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHELL OIL COMPANY, *et al.*,
Petitioners,

v.

THE DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress, in giving the Department of Energy almost unlimited powers to compel data creation, impliedly intended to give those powers to the antitrust enforcement agencies as well, thus raising serious due process and Fourth Amendment questions.

2. Whether the question expressly reserved for future cases in *LaSalle National Bank*, namely whether the "improper purpose" doctrine is a technical rule confined to tax summons enforcement matters or a basic rule prohibiting regulatory agencies from being used as information gathering tools for law enforcement agencies, should be resolved.

3. Whether the conflict between the United States Courts of Appeals for the Third Circuit and the District of Columbia Circuit concerning the general applicability of the "improper purpose" doctrine should be resolved.

PARTIES

The parties appearing as plaintiffs-appellants before the United States Court of Appeals for the Third Circuit were Shell Oil Company, Texaco Inc., Phillips Petroleum Company, Coastal States Gas Corporation, Gulf Oil Corporation, Mobil Corporation, Union Oil Company of California and Continental Oil Company.* The parties appearing as defendants-appellees were the Department of Energy, James R. Schlesinger (Secretary, Department of Energy), the Energy Information Administration, Lincoln E. Moses (Administrator, Energy Information Administration), the Office of Management and Budget, James T. McIntyre, Jr. (Director, Office of Management and Budget).

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* In accordance with Rule 28.1 of the Rules of the Supreme Court, as amended, a listing of all parent companies, subsidiaries and affiliates of each of the named corporations is included as Appendix E to this petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	i
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
A. The Financial Reporting System	2
B. Opinions Below	6
Reasons for Granting the Writ	7
I. The Writ Should be Granted to Determine Whether Congress, In Giving the Department Of Energy Almost Unlimited Powers of Data Collection for Planning Purposes, Impliedly Intended to Do Away with Limitations and Safeguards Deliberately Built Into the Discovery Powers Granted the Antitrust Agencies	9
A. In Its Only Explicit Treatment of the Subject, Congress Granted Much Narrower Discovery Powers to the Department of Justice and the Federal Trade Commission Than the Investigatory Powers It Granted the Department of Energy	9
B. The Text, Structure, and Legislative History of the DOE Act Demonstrate That the Department of Energy Was Not Intended to Act as a Discovery Arm of the Antitrust Law Enforcement Agencies	12

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TABLE OF CONTENTS—Continued

Page

C. The Third Circuit Court of Appeals' Construction of the DOE Act Raises Profound Constitutional Problems and Ought, for that Reason Alone, To Be Avoided 15

II. The Writ Should be Granted to Determine Whether the Question Expressly Reserved For Future Cases In *LaSalle National Bank*, Namely Whether The "Improper Purpose" Doctrine Is a Technical Rule Confined to Tax Summons Enforcement Matters or a Basic Rule Prohibiting Regulatory Agencies From Being Used As Information Gathering Tools For Law Enforcement Agencies 17

III. The Judgment Below Conflicts With Decisions of Other Circuits Regarding the Extent to Which this Court's Holding in *LaSalle* Prohibits Federal Agencies From Using Their Compulsory Process to Obtain Information for Other Agencies 19

Conclusion 20

TABLE OF AUTHORITIES

CASES Page

Atlantic Seaboard Corp. v. *FPC*, 404 F.2d 1268 (D.C. Cir. 1968) 13
CAB v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976) 16
California Bankers Association v. *Shultz*, 416 U.S. 21 (1974) 16, 18
ICC v. *Gould*, No. 79-2556 (3d Cir. June 30, 1980), *petition for cert. filed*, 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980) (No. 80-403) 19
Industrial Union Department, AFL-CIO v. *American Petroleum Institute*, 48 U.S.L.W. 5022 (U.S. July 2, 1980) 15
In Re Exxon Corp., pending as FTC Dkt. No. 8934 16
Kent v. *Dulles*, 357 U.S. 116 (1958) 15
NLRB v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979) 19
OKC Corp. v. *Fourth National Bank of Commerce*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,940 (N.D. Okla. 1979) 20
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946) 15
SEC v. *Dresser Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,573 (D.C. Cir. 1980) (en banc), *cert. denied*, 49 U.S.L.W. 3372 (U.S. Nov. 18, 1980) 19
SEC v. *OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979) 20
SEC v. *Wheeling-Pittsburgh Steel Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,169 (3d Cir. 1980), *vacated and rehearing en banc ordered*, No. 80-1375 (3d Cir. Sept. 23, 1980) 20
United States v. *Art Metal-U.S.A., Inc.*, 484 F. Supp. 884 (D.N.J. 1980) 20
United States v. *LaSalle National Bank*, 437 U.S. 298 (1978) ..... i, 8, 17-20
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950) 11, 15-16, 18

TABLE OF AUTHORITIES—Continued

CONSTITUTION Page

U.S. Const. amend. IV ..... i, 2, 8, 15-17
U.S. Const. amend. V ..... i, 2, 15, 17

STATUTES AND FEDERAL REGISTER

U.S. Code:

Federal Trade Commission Act

15 U.S.C. § 46 (1976 & Supp. III 1979) 10
15 U.S.C. § 49 (1976) 10

Natural Gas Act

15 U.S.C. § 717(a) (1976) 13

Federal Energy Administration Act of 1974

15 U.S.C. § 772 (1976) 2, 4
15 U.S.C. § 772(c) (1976) 3, 11

Energy Supply and Environmental Coordination Act of 1974

15 U.S.C. § 796 (1976 & Supp. II 1978) 2, 4
15 U.S.C. § 796(a) (1976) 4
15 U.S.C. § 796(c) (1976) 4

Antitrust Civil Process Act

15 U.S.C. §§ 1311 *et seq.* (1976) 10
15 U.S.C. §§ 1311-14 (1976) 2
15 U.S.C. § 1312 (1976) 10

Petroleum Marketing Practices Act

15 U.S.C. § 2841 (Supp. II 1978) 14

Judicial Code

28 U.S.C. § 1254(1) (1976) 2

Department of Energy Organization Act

42 U.S.C. §§ 7111 *et seq.* (Supp. II 1978) 5
42 U.S.C. § 7111 (Supp. II 1978) 2

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 7111(1) (Supp. II 1978)	5
42 U.S.C. § 7111(2) (Supp. II 1978)	5
42 U.S.C. § 7112 (Supp. II (1978)	2
42 U.S.C. § 7112(12) (Supp. II (1978)	13
42 U.S.C. § 7133 (Supp. II 1978)	2
42 U.S.C. § 7135 (Supp. II 1978)	2, 12
42 U.S.C. § 7135(h) (Supp. II 1978)	5, 11
42 U.S.C. § 7135(h)(2)(B) (Supp. II 1978)	13
42 U.S.C. § 7135(h)(3) (Supp. II 1978)	14
42 U.S.C. §§ 7151-57 (Supp. II 1978)	14
42 U.S.C. § 7152(d)(1) (Supp. II 1978)	14
Federal Communications Commission Act	
47 U.S.C. § 303 (1976)	13
Civil Aeronautics Board Act	
49 U.S.C. § 1302(a)(7) (Supp. II 1978)	13
Interstate Commerce Commission Act	
49 U.S.C. § 10101(a)(4) (Supp. II 1978)	13
Session Laws:	
Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 4, 94 Stat. 374 (1980)	11
Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 13, 94 Stat. 374 (1980)	10
Federal Register:	
40 Fed. Reg. 43,612 (1975)	3
40 Fed. Reg. 43,613 (1975)	3
42 Fed. Reg. 35,187 (1977)	4
42 Fed. Reg. 35,188 (1977)	4
44 Fed. Reg. 2758 (1979)	5, 6
44 Fed. Reg. 2760 (1979)	5

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE HISTORY

Excerpts from Legislative History of Department of Energy Organization Act:

H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55-56 (1977) 13

MISCELLANEOUS

Excerpts from Testimony of John H. Shenefield during *Hearings on "Oversight of Department of Justice Antitrust Division Authorization of Funds for Fiscal Year 1980"* Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess., March 21, 1979 [*reprinted in* Appendix D at D-38 to D-43] 6

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No. ———

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THE DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced at Appendix A and reported at 1980-2 Trade Cas. (CCH) ¶ 63,525 (3d Cir. 1980). The opinion of the District Court for the District of Delaware is reproduced at Appendix B and published at 477 F. Supp. 413 (D. Del. 1979).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, entered on September 8, 1980, and reproduced at Appendix C, affirmed the judgment of the

United States District Court for the District of Delaware. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following statutes involved in this case are set forth in Appendix D: 15 U.S.C. §§ 772, 796, 1311-14 (1976 & Supp. II 1978); 42 U.S.C. §§ 7111-12, 7133, 7135 (Supp. II 1978).

STATEMENT OF THE CASE

A. The Financial Reporting System.

This case challenges the lawfulness of the Financial Reporting System, pursuant to which the Department of Energy ("DOE") and its subagency, the Energy Information Administration ("EIA"), have compelled energy producing companies to create intricate data relating to all aspects of their respective operations. This challenge

is premised on undisputed facts revealing that, although the Financial Reporting System form was issued under the compulsory process powers of DOE and EIA, the form, in fact, was designed by the Department of Justice and the Federal Trade Commission ("FTC") to elicit information to be used in the antitrust law enforcement proceedings of those agencies. Much of the information compelled for this purpose is *not* necessary for the statutory responsibilities of DOE or EIA, was *not* desired by DOE or EIA, was in fact desired *solely* by the Department of Justice and FTC for law enforcement investigations and could *not* be obtained directly by those agencies for use in antitrust law enforcement proceedings initiated by either agency.

Development of the Financial Reporting System commenced in 1975 as an effort by the Federal Energy Administration ("FEA") "to collect information needed for the formulation of energy policy . . ." 40 Fed. Reg. 43,613 (1975). Relying upon Section 13(c) of the Federal Energy Administration Act of 1974 ("FEA Act"), authorizing the FEA to require reports and information "necessary to enable the [FEA] Administrator to carry out his functions under this chapter" (15 U.S.C. § 772 (c) (1976)), FEA proposed a form which would provide it "with comprehensive, consistent and up-to-date financial information about the petroleum industry and its components" and was "designed to obtain all necessary information with a minimum of difficulty." 40 Fed. Reg. 43,612 (1975).

The type and extent of information which FEA, later the DOE, perceived as relevant to its energy policy responsibilities are reflected in the form FEA initially proposed in September 1975 and the slightly modified form proposed in July 1977. In proposing the July 1977 form, FEA again stated that it "requires financial information regarding petroleum company operations to

fulfill its responsibility to formulate energy policy." 42 Fed. Reg. 35,187 (1977). Toward this end, FEA solicited comments regarding the possible elimination of various reporting requirements and the inclusion of additional requirements "that will serve the public policy analysis process." 42 Fed. Reg. 35,188 (1977).[1]

The July 1977 form, containing 600 individual requests for data, was concededly sufficient to satisfy FEA's statutory responsibilities. However, during 1977 and 1978, the Department of Justice and FTC recognized that the Financial Reporting System, if drastically modified, had potential use in antitrust law enforcement investigations. Those agencies informed FEA that a modified reporting system could be used as an antitrust enforcement tool and forcefully urged that the form be substantially overhauled. The Department of Justice and FTC thus commenced aggressive efforts, continuing over the next year and a half, to transform the Financial Reporting System form to permit those agencies to create and obtain detailed investigative data for use in antitrust law enforcement proceedings.

FTC officials, including Chairman Michael Pertschuk and Bureau of Competition Director Alfred F. Dougherty, repeatedly demanded that FEA, and later DOE, change the form so that it would aid "the FTC's analysis of antitrust issues in the energy sector" and permit "the development of informed antitrust initiatives." At the same time, FTC sought changes that would "have . . . real usefulness to the FTC's antitrust enforcement efforts," with the intent "that data [would] be made available to [FTC] on an individual company basis."

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[1] In July 1977, FEA continued to rely upon Section 13 of the FEA Act and added the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 796 (1976 & Supp. II 1978), pursuant to which FEA was to file with the President and Congress quarterly reports containing energy information "necessary to assist in the formulation of energy policy." 15 U.S.C. § 796(a), (c) (1976).

Assistant Attorney General John H. Shenefield, head of the Justice Department's Antitrust Division, also urged drastic modification of the Financial Reporting System for antitrust law enforcement. Shenefield told FEA that the form proposed in July 1977 would be of "little use" to the Antitrust Division. Shenefield asked for "closer cooperation between the Antitrust Division and the FEA" so that the Department of Justice could play a significant role "in developing the kind of information requests helpful to us." Shenefield wanted "DOE to collect the data with a view towards DOJ needs and disclose it to DOJ once collected." [2] Toward these ends, both antitrust agencies met with the DOE in *ex parte* "nuts and bolts technical meeting[s]," the purpose and effect of which was to reformulate the Financial Reporting System to create and collect antitrust law enforcement investigative data.

On January 12, 1979, after almost two years of intensive efforts by Department of Justice and FTC officials to modify the form, DOE published its final Financial Reporting System form, containing 7200 individual requests for data. 44 Fed. Reg. 2758 (1979). At that time, DOE announced that individual company Financial Reporting System data would be shared with the law enforcement sections of the Department of Justice and FTC. 44 Fed. Reg. 2760 (1979). Twenty-seven energy-producing companies are presently required to

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[2] On August 4, 1977, the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. §§ 7111 *et seq.* (Supp. II 1978), creating the DOE, was enacted. The statute was passed in light of a congressional recognition that "an increasing shortage of nonrenewable energy resources" (42 U.S.C. § 7111(1) (Supp. II 1978)) presented "a serious threat to the national security of the United States." 42 U.S.C. § 7111(2) (Supp. II 1978). In directing implementation of a Financial Reporting System, the DOE Act transformed into a mandatory statutory directive the prior discretionary authority of FEA to require energy-producing companies to create and to submit financial reports. 42 U.S.C. § 7135(h) (Supp. II 1978).

submit completed Financial Reporting System forms to DOE on an annual basis. DOE has announced plans to expand the reporting requirement to encompass 300 companies. 44 Fed. Reg. 2758 (1979).

In testimony before Congress on March 21, 1979, Assistant Attorney General Shenefield recognized limitations on the Department of Justice's compulsory process powers and explained the principal motivation underlying the efforts of the Department of Justice to revamp the reporting form. The Department of Justice's discovery powers were "limited to the specific enforcement investigations and not the general advisory functions" and the Department lacked statutory authority to compel broad-based Financial Reporting System data outside the context of a specific investigation. See Appendix D at 40.

As finally published, the redrafted form reflected the full extent of Department of Justice and FTC influence, including a wholly new format containing 7,200 individual requests for data, as compared with the 1975 form's 600 individual requests for data. The form requires energy-producing companies annually to create and submit to DOE intricate data pertaining to all aspects of their respective operations.

B. Opinions Below.

The District Court and the Court of Appeals agreed that the facts pertaining to the extent, purpose and effect of Department of Justice and FTC influence on the design of the Financial Reporting System are not disputed. The District Court found that "[Department of Justice] and FTC officials participated actively over a significant period of time in making suggestions for modification of the then existing, proposed [Financial Reporting System] form," (477 F. Supp. at 425) that "many of the suggestions of these agencies were incorporated in the final version of the report form," (*id.*)

and that "the form differs from what it would have been without the participation of the [Department of Justice] and FTC in its development." *Id.* In fact, entire sections were added to the form at the behest of the antitrust enforcement agencies.

Although accepting these facts, the District Court concluded that, irrespective of the pu.poses for which Financial Reporting System data were compelled and their intended use, enforcement is mandated as long as the data "hav[e] value for energy policy planning purposes." *Id.* at 426.

In an unparalleled decision, the Court of Appeals held that the Department of Justice and FTC could circumvent statutorily prescribed compulsory process powers by resort to DOE's power to compel the Financial Reporting System. The Court of Appeals thus endowed DOE with compulsory process powers to collect a vast range of data not sought in good-faith pursuit of its statutory goals, but desired by the Department of Justice and FTC to supplement their information collection powers and to aid their law enforcement efforts. Since the Financial Reporting System form compels the creation of information which neither the Justice Department nor the FTC can compel on its own for use in antitrust enforcement proceedings, the Court of Appeals also imbued the antitrust agencies with compulsory process powers beyond those conferred by Congress.

REASONS FOR GRANTING THE WRIT

This petition raises issues of great importance concerning the permissible sweep and intrusiveness of discovery by the antitrust law enforcement agencies and, more generally, the investigatory and discovery powers of all agencies and departments of the federal government.

The judgment below transformed investigative powers given by Congress to the DOE into discovery powers for the Department of Justice and the FTC. The investigative powers which Congress conferred on DOE are not only far broader and more intrusive than any power Congress gave the antitrust agencies, but greater than those they would possess under a general warrant forbidden by the Fourth Amendment.

The question of whether Congress intended these law enforcement agencies to have such powers is, we submit, reason enough to grant the writ. But, because the Department of Justice and the FTC acquired these enormous disvovery powers by use of DOE's powers to compel energy companies to create evidence, this case also raises the question of whether the "improper purpose" doctrine of *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), is more than a technical doctrine applicable only to Internal Revenue Service summons enforcement procedures or rests upon a more profound rationale applicable to other government agencies. The Third Circuit, while recognizing the general applicability of *LaSalle*, thus creating a conflict with the District of Columbia Circuit, failed to apply *LaSalle* "to prevent other forms of agency abuse of congressional authority and judicial process." 437 U.S. at 318 n.20. There is also an increasing amount of district court litigation on this subject, which this Court expressly left open for resolution in "[f]uture cases" in *LaSalle*. *Id.*

These questions will continue to arise and are ripe for resolution in this case.

I. The Writ Should Be Granted to Determine Whether Congress, In Giving the Department Of Energy Almost Unlimited Powers of Data Collection for Planning Purposes, Impliedly Intended to Do Away with Limitations and Safeguards Deliberately Built Into the Discovery Powers Granted the Antitrust Agencies.

The enormous increase in the discovery powers of the antitrust enforcement agencies created by the judgment below, by itself and quite apart from the larger issues implicated, warrants review by this Court.

The Department of Justice's Antitrust Division and the FTC have extensive, but by no means unlimited, discovery powers. By making available to the Department of Justice and the FTC the full panoply of the investigatory powers of the DOE—powers appropriate to a department with responsibility for national planning with respect to vital resources, but not to law enforcement—the Third Circuit has endowed the law enforcement agencies with powers so contrary to American legal tradition and the constitutional values that underlie it that only the clearest expression of such an intention by Congress to accomplish such a transformation could justify the statutory interpretation. There is, however, no expression of such a congressional intent. To the contrary, the language, structure, and legislative history of the DOE Act demonstrate that Congress intended no such result.

A. *In Its Only Explicit Treatment of the Subject, Congress Granted Much Narrower Discovery Powers to the Department of Justice and the Federal Trade Commission Than the Investigatory Powers It Granted the Department of Energy.*

A comparison of the discovery powers now lodged in the Department of Justice and the FTC with the investigatory powers of the DOE demonstrates the enorm-

ity of the change in law accomplished by the Third Circuit.

The Department of Justice's Antitrust Division has independent authority to obtain information for use in connection with civil investigations pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 *et seq.* (1976). Information so requested must be relevant to the specific enforcement investigation specified in the civil investigative demand. In addition, the Department of Justice may utilize the broad powers of the grand jury to gather information in connection with criminal antitrust investigations. With regard to post-complaint litigation, the Department may also use the broad subpoena powers of the United States district courts. All three methods of discovery contain various procedural safeguards designed to protect the rights of actual and potential defendants to law enforcement proceedings, including the right of the recipient to be advised of the nature and scope of the law enforcement proceedings for which the information is compelled, to be informed that he is suspected of violating specific provisions of the law, and to decline production of information not relevant to the suspected violation. 15 U.S.C. § 1312 (1976). Every one of these rights is lost when the Department of Justice gets the DOE to compel the generation of information for Justice's law enforcement purposes.

The FTC also has independent authority, pursuant to Sections 6 and 9 of the Federal Trade Commission Act, 15 U.S.C. §§ 46 and 49 (1976 & Supp. III 1979), and the Federal Trade Commission Improvements Act of 1980, § 13, Pub. L. No. 96-252, 94 Stat. 374 (1980), to obtain information for use in its antitrust investigations. Each of these methods of discovery, like those of the Department of Justice, contains procedural safeguards

designed to protect the rights of potential defendants to law enforcement proceedings.[3]

By contrast, the DOE, through its Financial Reporting System, can compel companies to create information which would never have been generated for independent business reasons, (42 U.S.C. § 7135(h) (Supp. II 1978); 15 U.S.C. § 772(c) (1976)), and hence could never have been reached by Department of Justice or FTC law enforcement discovery powers. While the DOE Act requires that information collected be "necessary to achieve the purposes of [the DOE Act]," (42 U.S.C. § 7135(h) (Supp. II 1978)) the Court of Appeals regards any and all information about the industry as relevant given the broad mandate of the DOE. Hence, there is no safeguard of any relevance requirement when the Department of Justice and the FTC appropriate the powers of the DOE. Moreover, the recipient of a DOE Financial Reporting System form is told only that the information provided will be used in formulating energy policy. He receives no notice that he is under suspicion, is not advised of the nature or scope of any proceeding to which the information purports to be relevant, and is not given any opportunity to object to the demand on grounds recognized by this Court in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

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[3] Congress clarified the scope of and limitations applicable to the FTC's compulsory process powers on May 28, 1980, through passage of the Federal Trade Commission Improvements Act of 1980, *supra*. By these amendments, Congress explicitly provided that information obtained pursuant to the FTC's Line of Business program "shall be used only for statistical purposes," and that "[i]nformation for carrying out specific law enforcement responsibilities of the Commission shall be obtained under practices and procedures in effect on the date of the enactment of the Federal Trade Commission Improvements Act of 1980, or as changed by law." Pub. L. No. 96-252, § 4, 94 Stat. 374 (1980).

These are extraordinary results, and a congressional intent to confer upon law enforcement agencies powers so foreign to the American legal tradition, and fraught with so many constitutional problems, ought to be clearly manifested and not assumed.

An examination of the statute, however, demonstrates not an intent by Congress to give the Department of Justice and the FTC such unprecedented power but, instead, an intention to withhold it.

B. *The Text, Structure, and Legislative History of the DOE Act Demonstrate That the Department of Energy Was Not Intended to Act as a Discovery Arm of the Antitrust Law Enforcement Agencies.*

The DOE Act, which created EIA and assigned to it the functions of gathering, analyzing, and disseminating energy information, including development of a Financial Reporting System, nowhere mentions any responsibility of cooperating or coordinating with the Department of Justice or the FTC with respect to antitrust. 42 U.S.C. § 7135 (Supp. II 1978). Nowhere in the legislative history of the DOE Act, moreover, is there any reference to the notion that in the energy area, DOE was to become the investigative arm of the Department of Justice and the FTC. These are remarkable oversights if, as the court below held, an unprecedented power to require companies to create evidence was intended to be placed in the antitrust agencies. Such a revolution in the relationship of law enforcement to the private sector can hardly be supposed to have gone unremarked by any member of Congress.

The Court of Appeals attempted to find a warrant for its conclusion in the language of the DOE Act that the Financial Reporting System include information to permit "analysis of the competitive structure of sectors and functional groupings within the energy industry" and

on the stated objective of the DOE "to foster and assure competition among parties engaged in the supply of energy and fuels." 42 U.S.C. §§ 7112(12) and 7135(h)(2)(B) (Supp. II 1978). These are wholly inadequate bases from which to infer a power delegated through DOE to the Department of Justice and the FTC to require individual companies to create evidence for the enforcement agencies. Provisions such as these are commonplace in regulatory agencies and require only that the agency consider the effects of its regulatory actions upon competition.[4] In no other context has such language been construed as a mandate permitting the Department of Justice or the FTC to dictate investigative demands to another agency.[5]

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[4] The legislative history of the DOE Act confirms that DOE's competitive function was limited to consideration of the effects of its actions on competition. In comments on the objective of DOE "to foster and assure competition", the Conference Report stated: "This purpose is declarative of present law which requires agencies to give attention to antitrust principles in formulating regulatory policies and decisions." H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 55-56 (1977).

[5] Analogous provisions are contained in numerous statutes which govern the actions of the Civil Aeronautics Board (49 U.S.C. § 1302(a)(7) (Supp. II 1978)), the ICC (49 U.S.C. § 10101(a)(4) (Supp. II 1978)), the FPC (15 U.S.C. § 717(a) (1976)), the Federal Communications Commission (47 U.S.C. § 302 (1976)), and other federal agencies. Courts have interpreted statutory directives to still other federal agencies that they make decisions in accordance with "public interest" as encompassing a duty to inquire concerning competition in the regulated industry. *See, e.g.*, the Natural Gas Act, 15 U.S.C. § 717(a) (1976), and *Atlantic Seaboard Corp.* v. *FPC*, 404 F.2d 1268 (D.C. Cir. 1968). Under the rationale of the Third Circuit in the present case, these agencies could become investigatory arms of the Department of Justice and the FTC, a result no one, and certainly not Congress, ever anticipated.

That no such interpretation was intended here is shown by Congress' plan in consolidating some energy-related data gathering programs into DOE but not others. Consistent with this selective incorporation, Congress did not preempt agencies which were not consolidated into the DOE from using their own subpoena powers. 42 U.S.C. §§ 7151-57 (Supp. II 1978). But when data collection authority in a field was given to DOE, the agency previously wielding that authority was deprived of it. Thus, when Congress transferred the Department of Interior's Bureau of Mines data collection authority to the DOE, it simultaneously took away that power from the Department of Interior. *See* 42 U.S.C. § 7152(d)(1) (Supp. II 1978).[6]

Purely as a matter of statutory construction, it is clear that Congress had no intention in the DOE Act of turning over to the Department of Justice or the FTC the enormous investigatory powers it created for the purpose of keeping itself and the DOE informed about this heavily regulated and increasingly crucial group of resources. The matter does not, however, rest upon pure statutory construction alone, for the question of a proper construction is heavily affected by the promixity of values protected by the Constitution.

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[6] Also indicative of congressional intent is the fact that while the DOE Act expressly provides that EIA shall "consult with the Chairman of the Securities and Exchange Commission" (42 U.S.C. § 7135(h)(3) (Supp. II 1978)), there is a conspicuous absence of any provision for consultations with the FTC or the Department of Justice. That Congress knows how to include the antitrust agencies when it intends their participation is shown by Title III of the Petroleum Marketing Practices Act, enacted in 1978, which authorizes the Secretary of Energy to "consul[t] with the Chairman of the Federal Trade Commission and the Attorney General," to conduct a specialized study. 15 U.S.C. § 2841 (Supp. II 1978).

C. *The Third Circuit Court of Appeals' Construction of the DOE Act Raises Profound Constitutional Problems and Ought, for that Reason Alone, To Be Avoided.*

However broad the government's power to require information or documents from corporations, there is a point at which the Fourth Amendment limits that power. That point is reached and passed when the agency demand becomes the equivalent of a "general warrant or writ of assistance, odious in both English and American history." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 207 (1946). Although the present case has severe constitutional overtones, we do not argue here that DOE has been give unconstitutional powers. Nor need we even argue that Congress could not constitutionally have given to law enforcement agencies such massive and intrusive powers to compel the creation of evidence, though surely the matter admits of great doubt.

What we do contend is that the constitutional problems are sufficiently severe, and values emanating from the Fourth Amendment and the Due Process Clause of the Fifth Amendment press so heavily, that the statute should not be interpreted as the Third Circuit has read it without the clearest manifestation of an intention by Congress to accomplish so radical a change in law enforcement powers. *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 48 U.S.L.W. 5022, 5032 (U.S. July 2, 1980); *Kent* v. *Dulles*, 357 U.S. 116, 129-30 (1958).

This Court expressed the safeguards required by the Fourth Amendment and due process in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950):

> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Com.* v. *American Tobacco Co.*, 264 U.S. 298 . . . [1924]. But it is sufficient if the inquiry is

within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.

California Bankers Association v. *Shultz*, 416 U.S. 21 (1974), established that the Fourth Amendment applies to corporations, and this Court was careful to point out that the regulations challenged "do not authorize indiscriminate rummaging among the records of the plaintiffs" (*id.* at 62), and that the information required to be reported "is sufficiently described and limited in nature . . . so as to withstand the Fourth Amendment challenge" (*id.* at 67).

None of these safeguards are present where the Department of Justice and the FTC are permitted to demand that the DOE require the creation of information which, as the district court found, DOE would not have sought for its own purposes. The information is not limited by anything except the antitrust enforcement agencies' curiosity and need not be relevant to any investigation. Worse, the information may be relevant to a pending case, but because the company has to create it, the Department of Justice and the FTC could not have compelled its creation on their own.[7] This is worse than "indiscriminate rummaging among the records"; it is the indiscriminate power to compel the creation of records for indiscriminate rummaging. This goes beyond the powers government would have if general warrants and writs of assistance were permitted. The Third Circuit's rationale here conflicts sharply with that of the Seventh Circuit in *CAB* v. *United Airlines, Inc.*, 542 F.2d 394 (7th Cir. 1976), a case which construed the CAB's powers of discovery to avoid the very constitutional problems which press upon the statutory construction here.

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[7] Thus, for example, the Financial Reporting System requires companies to create and report data based upon transactions among the eight petroleum companies that are respondents in the FTC's pending proceeding against the very same eight companies. *In Re Exxon Corp., pending as* FTC Docket No. 8934.

II. The Writ Should be Granted to Determine Whether the Question Expressly Reserved for Future Cases in *LaSalle National Bank*, Namely Whether The "Improper Purpose" Doctrine Is a Technical Rule Confined to Tax Summons Enforcement Matters or a Basic Rule Prohibiting Regulatory Agencies From Being Used As Information Gathering Tools For Law Enforcement Agencies.

In *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313, 316 (1978), this Court reaffirmed the "good-faith" limitation on an agency's use of compulsory process and the need "to determine whether the agency is honestly pursuing [its] goals . . . by issuing the summons." This Court explicitly held that "the good-faith standard will not permit the IRS to become an information-gathering agency for other departments, including the Department of Justice. . . ." 437 U.S. at 317.

The question of whether the "improper purpose" doctrine of *LaSalle* applies generally to agency investigative powers is one of very considerable importance to many agencies of government and to a private sector subject both to comprehensive regulation and to antitrust enforcement action. Petitioners submit that *LaSalle's* rule is essential to protect that due process and Fourth Amendment values discussed above. As this Court stated in *LaSalle*, "[t]hese requirements are not intended to be exclusive. Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." *Id.* at 318 n.20.

Under the decision of the Court of Appeals, the Department of Justice and the FTC are able to circumvent the limitations statutorily placed upon them as law enforcement agencies by using powers appropriate to planning agencies. The result is that a company is required to create masses of information for DOE which, unknown to the company, turns out to be information for an un-

announced investigation, or even evidence in an ongoing trial, conducted by the Department of Justice or FTC. That is why the prophylactic rule of *LaSalle* must apply to agency investigation generally. If it does not, if it is a mere technicality applying only to tax summons enforcement, the strategem employed by the Department of Justice and the FTC here, with the cooperation of DOE, makes nullities of this Court's pronouncements and distinctions in *Morton Salt* and *California Bankers Association*.

The case for application of the *LaSalle* rule here is stronger than in the tax summons enforcement area. It is impossible to draw a bright-line distinction in cases like *LaSalle* because the civil and criminal aspects of tax investigations are inevitably intertwined. Thus, the question of where the IRS's function ends and the Department of Justice's begins is necessarily difficult to answer. No such problem exists here. Each agency has law enforcement functions with investigatory and discovery powers appropriate to those functions. There is no difficulty, therefore, in designing a *LaSalle* prophylactic rule of easy applicability: The Department of Justice and the FTC may not participate in the design of DOE's Financial Reporting System and may not receive from DOE the data created by companies in response to the Financial Reporting System.

The question of the general applicability of *LaSalle's* "improper purpose" doctrine is, therefore, one of great importance to the legitimate functions of government and a question with serious constitutional implications. For that reason, the question deserves resolution by this Court.

III. The Judgment Below Conflicts With Decisions of Other Circuits Regarding the Extent to Which this Court's Holding in *LaSalle* Prohibits Federal Agencies From Using Their Compulsory Process to Obtain Information for Other Agencies.

There is a wide divergence among the courts regarding the extent to which *LaSalle* precludes other federal agencies from utilizing their respective compulsory process powers for purposes this Court held unlawful when pursued by the Internal Revenue Service.

Though this Court in *LaSalle* stated that "these requirements are not intended to be exclusive," 437 U.S. at 318 n.20, the District of Columbia Circuit in *SEC* v. *Dresser Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,573 (D.C. Cir. 1980) (*en banc*), *cert. denied*, 49 U.S.L.W. 3372 (U.S. Nov. 18, 1980), disagreed. In *Dresser*, the District of Columbia Circuit held that the limitations imposed by this Court in *LaSalle* "applie[d] solely to the statutory scheme of the Internal Revenue Code" and refused to apply *LaSalle* to its review of a Securities and Exchange Commission subpoena. *Id.* at 97,997. The District of Columbia Circuit reasoned that the *LaSalle* rule was based primarily upon the fact that the Internal Revenue Service's civil authority ceased upon referral of a case to the Department of Justice, rather than upon any generally applicable division of agency functions. The present case and two other recent decisions of the Third Circuit stand in direct conflict with the holding of the District of Columbia Circuit in *Dresser*.

Other courts have applied *LaSalle* to compulsory process issued by agencies other than the Internal Revenue Service. *ICC* v. *Gould*, No. 79-2556 (3d Cir. June 30, 1980), *petition for cert. filed*, 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980) (No. 80-403); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1979);

United States v. *Art Metal-U.S.A., Inc.*, 484 F. Supp. 884, 887 (D.N.J. 1980); *SEC* v. *OKC Corp.*, 474 F. Supp. 1031, 1034 (N.D. Tex. 1979); *OKC Corp.* v. *Fourth National Bank of Commerce*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,940 (N.D. Okla. 1979). *See also SEC* v. *Wheeling-Pittsburgh Steel Corp.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,619 (3d Cir. 1980), *vacated and rehearing en banc ordered*, No. 80-1375 (3d Cir. Sept. 23, 1980), wherein the Third Circuit is considering *en banc* the applicability of *LaSalle* to a Securities and Exchange Commission subpoena.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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